

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Verkler, Inc. and Local 16, Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Petitioner and Local 9, International Union of Bricklayers and Allied Craftworkers, AFL-CIO. Case 7-RC-21936

December 20, 2001

DECISION ON REVIEW

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN
AND WALSH

On March 23, 2001, the Acting Regional Director for Region 7 issued a Decision and Order (relevant portions of which are attached as an appendix). Thereafter, in accordance with Section 102.67 of the National Labor Relation Board's Rules and Regulations, the Petitioner filed a timely request for review of the Acting Regional Director's decision and the Intervenor filed an opposition. By Order dated July 18, 2001, the Board granted the Petitioner's request for review. The Intervenor filed a brief on review.

Having carefully considered the entire record, including the Intervenor's brief on review, with respect to the issue of whether the Employer and the Intervenor entered into a 9(a) bargaining relationship, the Board has decided to affirm the Acting Regional Director's decision.¹ Having found a 9(a) relationship, the Board further affirms the Acting Regional Director's determination that the present petition is barred and thus should be dismissed.²

Dated, Washington, D.C. December 20, 2001

Peter J. Hurtgen, Chairman

Wilma B. Liebman, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN HURTGEN, concurring.

¹ *Central Illinois Construction*, 335 NLRB No. 59 (2001).

² *VFL Technology Corp.*, 329 NLRB No. 49 (1999) (reiterating the Board's policy that "a 9(a) contract will bar any petition filed outside the window period of that contract").

I agree that the agreement here contains language, which establishes a 9(a) relationship. However, in my view, that agreement and language are binding only on the parties thereto. The Petitioner is not a party thereto. Accordingly, if the petition had been filed within 6 months of the recognition, the Petitioner would have been free to assert that such recognition was not majority-based. However, inasmuch as the petition was filed more than 6 months after the recognition, such an assertion is untimely. A contrary view would mean that stable relationships, assertedly based on Section 9(a), would be vulnerable to attack based on stale evidence. That is not permitted with respect to unions in non-construction industries.¹ And, under *John Deklewa & Sons*, 282 NLRB 1375 at n. 53 (1987), unions in the construction industry are not to be treated less favorably than unions in non-construction industries. Thus, such an attack should not be permitted with respect to unions in the construction industry. Accordingly, I concur that the petition should be dismissed.

Dated, Washington, D.C. December 20, 2001

Peter J. Hurtgen, Chairman

NATIONAL LABOR RELATIONS BOARD

APPENDIX

DECISION AND ORDER

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, hereinafter referred to as the Act, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding,² the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.³

¹ *Machinists Local 1424 (Bryan Mfg. Co.) v. NLRB*, 362 U.S. 411 (1960); *S. L. Wyandanch Corp.*, 208 NLRB 883 (1974).

² The Petitioner and Intervenor filed briefs, which were carefully considered.

³ The Employer did not participate in the hearing held on February 23, 2001, and therefore the remaining parties were unable to stipulate to the Board's jurisdiction over the Employer. According to the record, the Employer, an Indiana corporation with a principal place of business in South Bend, Indiana, submitted to the Regional Office prior to the hearing a completed questionnaire on commerce indicating that during the calendar year 2000 it performed services valued in excess of

3. The labor organizations involved herein claim to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The Petitioner, Plasterers Local 16 (hereinafter Petitioner), filed the instant petition on December 29, 2000, requesting certification of representative in a bargaining unit comprised of the Employer's 10 cement mason employees. Bricklayers Local 9 (hereinafter Intervenor) asserts the petition should be dismissed based on a contract bar and alternatively, if the petition is not dismissed, that the appropriate unit should include both cement masons and bricklayers employed by the Employer. The Employer currently employs approximately 40 bricklayers.

The Employer is an Indiana corporation engaged in general construction and employs approximately 300 employees. The Petitioner is party to a Section 8(f) collective-bargaining agreement with a multiemployer association, the Michigan Chapter, Associated General Contractors of America, Inc. (hereinafter the AGC) in effect from June 1, 2000 through May 31, 2003.⁴ Prior to November 7, 2000, the Petitioner and the Employer did not have a collective-bargaining relationship. However, on November 7, 2000, the Employer, by its chief executive officer and treasurer, Fred Lusk, agreed to be bound to the AGC collective-bargaining agreement. This agreement geographically covers portions of the Lansing and Jackson area, portions of the Flint area, portions of the Kalamazoo and Battle Creek areas, and portions of the Grand Rapids and Muskegon area. On November 7, Lusk also signed an "Addendum to Agreement" which altered the geographic jurisdiction covered by the 2000-2003 agreement by extending its coverage to the cities of Adrian, Ann Arbor, St. Joseph, Lapeer, Port Huron, Saginaw, Traverse City, Benton Harbor, and Big Rapids, the county of Branch, and the upper peninsula of Michigan. The agreement and addendum covers cement mason employees only.

The Intervenor was party to a collective-bargaining agreement effective from June 22, 1997 through June 21, 2000, with a multi-employer association, the Michigan Council of Employers of Bricklayers & Allied Craftworkers (hereinafter the MCE). Although the Employer is not a full member of the association, it executed the contract as a non-association member on August 26, 1998. According to the rollover provision of the 1997-2000 contract, the Employer would become bound to a successor agreement negotiated between the Intervenor and MCE if the Employer failed to give timely notice to amend or terminate the contract. The Employer did provide such notice

to MCE and the Intervenor. The successor agreement between the MCE and the Intervenor is effective by its terms from June 22, 2000 through August 1, 2003. Geographically, the agreements cover both cement masons and bricklayers within the State of Michigan, excluding the counties of Wayne, Oakland, Macomb, and Monroe. Thus, employees in the petitioned-for unit are covered by the contracts. Both contracts contain the following language:

The Employer, which is a Section 9(a) Employer within the meaning of the National Labor Relations Act, hereby recognizes and acknowledges that the Union is the exclusive representative of all of its Employees in the classifications of work falling within the jurisdiction of the Union, as defined in Article II of this Agreement, for the purpose of collective bargaining.

The Union has submitted to the Employer evidence of majority support, and the Employer is satisfied that the Union represents a majority of the Employer's Employees in the bargaining unit described in the current collective bargaining agreement between the Union and the Employer.

The Employer therefore voluntarily agrees to recognize the Union as the exclusive bargaining representative of all Employees in the contractually described bargaining unit on all present and future jobsites within the jurisdiction of the Union, unless and until such time the Union loses its status as the Employees' exclusive representative as a result of a NLRB election requested by the Employees.

The Employer and the Union acknowledge that they have a 9(a) relationship as defined under the National Labor Relations Act and that this Recognition Agreement confirms the on-going obligation of both parties to engage in collective bargaining in good faith.

On August 2, 2000, the Employer and Intervenor signed another document, called an "interim agreement," reaffirming that the Employer intends to abide by the terms and conditions of the June 22, 2000 through August 1, 2003 collective-bargaining agreement.

As the Intervenor's current contract subsumes the petitioned-for unit, if its bargaining relationship is controlled by Section 9(a) of the Act, the contract will bar the instant petition. In the construction industry, parties may create a bargaining relationship pursuant to either Section 9(a) or 8(f) of the Act. In the absence of evidence to the contrary, the Board presumes that the parties intend their relationship to be governed by Section 8(f), rather than Section 9(a), and imposes the burden of proving the existence of a 9(a) relationship on the party asserting that such a relationship exists. *H.Y. Floors & Gameline Painting*, 331 NLRB No. 44 (2000); *John Deklewa & Sons*, 282 NLRB 1375 (1987), enfd. sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d. Cir. 1988), cert. denied 488 U.S. 889 (1988). To establish voluntary recognition in the construction industry pursuant to Section 9(a), the Board requires evidence that the union (1) unequivocally demanded recognition as the employees' 9(a) representative, and (2) that the Employer unequivocally accepted it as such. *H.Y. Floors & Gameline*

\$50,000 for customers outside the State of Indiana, and during this same period of time purchased in excess of \$50,000 in materials directly from outside the State of Indiana. Accordingly, based thereon, I find that the Employer is engaged in commerce within the meaning of the Act and that it is appropriate to assert jurisdiction in the instant matter.

⁴ The agreement does contain 9(a) language. However, Petitioner contends that it does not have a 9(a) relationship with the Employer and further that the 9(a) language of the contract has no impact on whether an election should be conducted in this matter.

Painting, 331 NLRB slip op. at 1. The Board also requires a contemporaneous showing of majority support by the union at the time 9(a) recognition is granted. *Golden West Electric*, 307 NLRB 1494, 1495 (1992). However, as to this contemporaneous showing the Board has held that an employer's acknowledgement of such majority support is sufficient to preclude a challenge to majority status. *H.Y. Floors & Gameline Painting*, supra; *Oklahoma Installation Co.*, 325 NLRB 741 (1998). Moreover, the Board has held that a challenge to 9(a) status must be made within a 6-month period after the grant of 9(a) recognition. *Casale Industries*, 311 NLRB 951 (1993).

I find that the Employer's agreement on August 26, 1998, to be bound as a nonassociation member to the MCE contract constituted an unequivocal acceptance of the Intervenor's unequivocal demand for recognition as the petitioned-for unit employees' 9(a) representative.⁵ As part of that agreement, the Employer clearly acknowledged that the Intervenor had submitted to the Employer evidence of majority support and that the Employer was satisfied that the Intervenor represented a majority of its unit employees. Accordingly, as of August 26, 1998,

⁵ Petitioner argues that the document signed by Lusk on August 26, 1998, did not include 9(a) language. Although this is accurate, the document states that Lusk read and agreed "to be bound by all the terms and conditions set forth in the foregoing agreement," and there is no evidence that Lusk did not understand the significance of the 9(a) language in the MCE agreement.

the Intervenor was the 9(a) representative of the Employer's cement mason and bricklayer employees.

Any challenge to the Intervenor's 9(a) status must have been interposed within the 6-month period following August 26, 1998. The Petitioner did not challenge the Intervenor's majority status until the filing of the instant petition on December 29, 2000, over 2 years after the Intervenor gained 9(a) status and at least 6 months after the current contract became effective.⁶ The instant petition therefore is barred and must be dismissed.⁷

IT IS ORDERED that the instant petition is dismissed.⁸

Dated at Detroit, Michigan, this 23rd day of March

⁶ Even if the Petitioner's challenge to the Intervenor's majority status had been timely, I note that Petitioner submitted no evidence to rebut the Intervenor's majority, either at the time of recognition or at any time since. The mere filing of a petition by the Petitioner does not itself constitute such a rebuttal.

⁷ Additionally, the Employer's execution of the "interim agreement" on August 2, 2000, stating that it intends to abide by the terms and conditions of the 2000–2003 MCE collective-bargaining agreement, reaffirms that the Employer was bound to the new contract even if it had not been automatically renewed.

⁸ Under the provisions of the Board's Rules and Regulations, a request for review of this Decision and Order may be filed with the National Labor Relations Board, addressed to the Executive Secretary, Franklin Court, 1099 14th Street, N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by April 6, 2001.